

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Section 73.622(b))

Table of Allotments,)

Digital Television Broadcast Stations)

(Nampa, Idaho))

MM Docket No. 01-54 /

RM-9918

To: Chief, Video Services Division
Mass Media Bureau

MOTION TO STRIKE

Idaho Independent Television, Inc. ("IIT"), licensee of KTRV(TV), Nampa, Idaho, by its attorneys, hereby respectfully submits this Motion to Strike the "Comments in Response to Reply Comments of Idaho Independent Television, Inc." ("Comments in Response") filed in this proceeding¹ by State Board of Education, State of Idaho ("State Board of Education").² State Board of Education's Comments in Response are untimely and frivolous and therefore should be dismissed forthwith.

BACKGROUND

On February 23, 2001, the Commission issued the above-captioned *Notice* proposing the substitution of Channel 13 for Channel 44 for KTRV-DT in response to IIT's Petition for Rule

¹ Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Nampa, Idaho), *Notice of Proposed Rule Making*, MM Docket No. 01-54, RM-9918 (rel. Feb. 23, 2001) ("*Notice*").

² Comments in Response to Reply Comments of Idaho Independent Television, Inc., filed by State Board of Education, State of Idaho, in MM Docket No. 01-54, RM-9918 on May 31, 2001 ("State Board of Education's Comments in Response").

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Making filed November 1, 1999, as amended March 17, 2000, and May 5, 2000. The *Notice* set comment and reply comment deadlines of April 16, 2001, and May 1, 2001, respectively.

In response to the *Notice*, IIT filed Comments in support of the proposed channel substitution and stated its intention to construct the proposed facilities.³ State Board of Education filed Comments arguing that KTRV-DT's proposed channel substitution should be denied because the proposed channel substitution allegedly would not meet the two percent criterion for *de minimis* impact and discussing the effects of interference with regard to the second primary service and the lack of cable television service in the area.⁴ Oregon Public Broadcasting ("OPB") filed Comments in Opposition admitting that KTRV-DT's proposed channel substitution complies with the two percent criterion for *de minimis* impact but arguing that the Commission should not apply its rules to rural areas.⁵

On May 1, 2001, IIT submitted Reply Comments responding to the Comments filed by State Board of Education and by OPB.⁶ Specifically, IIT's Reply Comments disagreed with State Board of Education's contention that the proposed channel substitution did not comply with the Commission's two percent criterion for *de minimis* impact. Two separate consulting engineers and the Commission have determined that the KTRV-DT proposal fully complies with the two percent criterion and thus is grantable.

³ Comments of Idaho Independent Television, Inc., filed by Idaho Independent Television, Inc. in MM Docket No. 01-54, RM-9918 on April 13, 2001.

⁴ Comments filed by State Board of Education, State of Idaho, in MM Docket No. 01-54, RM-9918 on April 13, 2001.

⁵ Comments in Opposition filed by Oregon Public Broadcasting in MM Docket No. 01-54, RM-9918 on April 16, 2001.

⁶ Reply Comments of Idaho Independent Television, Inc., filed by Idaho Independent Television, Inc. in MM Docket No. 01-54, RM-9918 on May 1, 2001 ("IIT's Reply Comments").

IIT's Reply Comments also stated that the Commission should dismiss State Board of Education's and OPB's arguments regarding the *de minimis* interference resulting from KTRV-DT's proposed channel substitution because they are irrelevant to the analysis of whether KTRV-DT's channel substitution proposal complies with the Commission's rules. IIT also argued that the Commission has determined that the applicable interference standard in DTV channel substitution requests is the two percent *de minimis* standard, and the Commission already has rejected arguments similar to those of State Board of Education and OPB about loss of service in balancing the importance and burden of implementing digital television service. IIT's Reply Comments further stated that by asking the Commission to deny a compliant channel substitution proposal solely on the basis of other criteria, State Board of Education and OPB essentially are requesting the Commission to disregard its own rules and reconsider its decision in the *Reconsideration of Sixth Report and Order*.⁷ IIT's Reply Comments accordingly urged the Commission to grant the proposed channel substitution for KTRV-DT, to deny the Comments filed by State Board of Education, and to deny the Comments filed by OPB. State Board of Education and OPB did not file reply comments.

ARGUMENT

The period for filing comments in this proceeding closed May 1, 2001. Thirty days later, on May 31, 2001, State Board of Education submitted its Comments in Response. Thus, as State Board of Education recognizes,⁸ its Comments in Response were not timely filed. Accordingly,

⁷ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, ¶ 80 (1998) ("*Reconsideration of Sixth Report and Order*").

⁸ State Board of Education's Comments in Response at 1.

IIT respectfully urges the Commission to deny State Board of Education's request for leave and to strike State Board of Education's Comments in Response as untimely.⁹

The Commission also must dismiss State Board of Education's Comments in Response as a frivolous pleading. State Board of Education argues that IIT's Reply Comments should have included certain information that State Board of Education concedes does not even apply to the case at hand.¹⁰ This hardly constitutes "legal error."¹¹

IIT's Reply Comments stated that because KTRV-DT's proposed channel substitution would result in less than two percent interference, it complies with the Commission's two percent *de minimis* rule and thus is grantable.¹² IIT's Reply Comments explained that the Commission's two percent *de minimis* rule allows a station to make changes in its operation "where the requested change would not result in more than 2 percent increase in interference to the population served by another station."¹³ State Board of Education's Comments in Response states that IIT's Reply Comments did not mention the provision of the rules that states that "no new interference may be caused to any station that already experiences interference to 10 percent or more of its population or that would result in a station receiving interference in excess of 10 percent of its population."¹⁴ Yet, State Board of Education then concedes that this provision

⁹ See 47 C.F.R. § 1.415(d) (2000).

¹⁰ State Board of Education Comments in Response at 3.

¹¹ *Id.* at 2, n.1.

¹² IIT's Reply Comments at 4. See 47 C.F.R. § 73.623(c)(2)(2000).

¹³ *Id.* (quoting Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, ¶ 80 (1998) ("Reconsideration of the Sixth Report and Order")).

¹⁴ State Board of Education Comments in Response at 3 (citing *Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, 7451 (1998)).

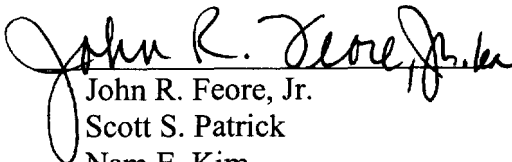
*“does not appear to be directly applicable in this instance.”*¹⁵ IIT agrees that this provision does not apply in this instance. IIT’s Reply Comments appropriately addressed only the *applicable* provisions of the Commission’s rules and thus contained no legal error.

State Board of Education contends that even though this provision does not apply in this case, IIT’s Reply Comments nevertheless should have included it. Yet, State Board of Education provides no factual or legal basis to support its argument. Not only has the time for such an argument passed, but State Board of Education’s allegation of legal error is clearly frivolous and obviously an attempt to “have the last word” on the record long after the pleading cycle has ended.

In light of the foregoing, the Commission must strike State Board of Education’s Comments in Response forthwith as untimely and frivolous.

Respectfully submitted,

IDAHO INDEPENDENT TELEVISION, INC.

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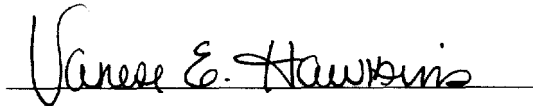
¹⁵ *Id.* (emphasis added).

CERTIFICATE OF SERVICE

I, Vanese Hawkins , a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 13th day of June, 2001, the foregoing "Motion to Strike" was served via first class mail to the following:

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A handwritten signature in cursive script, reading "Vanese E. Hawkins", is written over a horizontal line.

Vanese Hawkins